

Decision 05-01-036

January 13, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (E 3338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.

Application 00-11-038
(November 16, 2000)

Emergency Application of Pacific Gas and Electric Company to Adopt a Rate Stabilization Plan (U 39 E).

Application 00-11-056
(Filed November 22, 2000)

Petition of THE UTILITY REFORM NETWORK for Modification of Resolution E-3527.

Application 00-10-028
(Filed October 17, 2000)

**ORDER GRANTING LIMITED REHEARING
OF DECISION 04-12-014**

I. SUMMARY

In Decision (D.) 04-12-014, we adopted a permanent methodology for allocating the Department of Water Resources' ("DWR") annual revenue requirement determination between Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("Edison") and San Diego Gas & Electric Company ("SDG&E"). For DWR contract costs, the methodology first allocates these costs on a cost-follows-contract basis.¹ The resulting allocation is then adjusted so that the forecasted above-market costs of these contracts are shared equally by all ratepayers in

¹ DWR's contracts were physically allocated among the three utilities in D.02-09-053.

the PG&E, Edison and SDG&E territories. For DWR's non-contract costs, the allocation percentages adopted in D.04-08-050 are made permanent.

SDG&E filed a timely application for rehearing of the decision.² It contends that the adopted allocation methodology and the Commission's decision to not allow SDG&E to present direct testimony and evidence regarding the above-market cost allocation methodology violates Public Utilities Code section 1757. It further contends that the record does not support use of a fixed above-market cost forecast. A response was filed jointly by Pacific Gas and Electric Company, Southern California Edison Company, and The Utility Reform Network (jointly, "Settling Parties") opposing SDG&E's application for rehearing.

We have carefully considered the allegations raised in SDG&E's application for rehearing and are of the opinion that limited rehearing should be granted to permit the parties to propose how the above-market costs shall be determined. Rehearing of all other issues raised by SDG&E is denied.

II. DISCUSSION

A. **Although the record supports the underlying allocation methodology adopted by the Commission, it does not support the above-market costs to be allocated.**

SDG&E contends that by using a fixed forecast of above-market costs in the allocation methodology the Commission violated various provisions of Public Utilities Code section 1757. (SDG&E's Application, pp. 5-6.) It further contends that use of a fixed above-market cost forecast is not supported by the record. (SDG&E's Application, pp. 17-18.) While SDG&E's rehearing application purports to challenge the entire allocation methodology adopted in D.04-12-014, the allegations of error center mainly on

² On January 11, 2005, SDG&E filed a Petition for Modification of D.04-12-014, requesting that the Decision be modified to adopt a fixed percentage methodology for allocating DWR's revenue requirement. In this Order, we are only disposing of SDG&E's rehearing application, not its Petition to Modify. Further, this Order does not prejudice our actions in response to SDG&E's petition.

our decision to use a fixed ten-year forecast of above-market costs in the allocation. (SDG&E's Application, p. 5.)

To the extent SDG&E is challenging the underlying allocation methodology, this challenge is without merit. The methodology of allocating DWR's contract costs on a cost-follows-contract basis, with an adjustment to ensure above-market costs are equitably shared by all ratepayers of the three utilities, was originally presented by Edison as its "alternative" litigation proposal. (See, e.g., Exh. 04-28, pp. 33-46 (Edison/Cushnie); Southern California Edison's Opening Brief ("Edison Opening Brief"), filed February 10, 2004, pp. 7-10.) This proposal was subject to evidentiary hearings, and all parties had ample opportunity to present testimony challenging the methodology, as well as comment on it. (See, e.g., Opening Brief of San Diego Gas & Electric Company, filed February 10, 2004, pp. 23, 30-33; Opening Brief of Pacific Gas and Electric Company Regarding the Allocation of DWR's Power Charge Revenue Requirement, filed February 10, 2004, pp. 5-6.) Further, the decision fully explains the policy reasons for adopting this methodology. (D.04-12-014, pp. 7, 10-11.) Thus, the underlying methodology is supported by the record.

However, SDG&E's arguments regarding the use of a fixed forecast of above-market costs have merit. Pursuant to Public Utilities Code section 1757(a)(4), a decision must be supported by "substantial evidence in light of the whole record." If findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187.)

A review of the record demonstrates that Edison had originally proposed its forecast of above-market costs for "reference" purposes, and had proposed that these costs be updated annually. (Exh. 04-28, pp. 42-45 (Edison/Cushnie).) In its Opening Brief, Edison explained that "[a]n annual determination of the [above-market costs] on a forecast basis is necessary as a ten-year projection of such costs will be unreliable in the later years." (Edison Opening Brief, p. 7, fn. 6.) Further, it proposed that the annual

above-market costs be determined through a “joint use model” developed by the three utilities. (Edison Opening Brief, p. 16.)

Based on these statements, we could not reasonably infer that Edison had intended to have its forecast used to set above-market costs on a permanent basis. Although the Settling Parties had argued that the Edison forecast could be adopted without any updates on the grounds that the forecast was part of the record and parties had had an opportunity to evaluate and comment on it, this reasoning is infirm. (*Comments of the Settling Parties on the Alternate Proposed Decision of Commissioner Brown and the Proposed Alternate Decision of Commissioner Peevey*, dated September 16, 2004, pp. 4-5.) Based on Edison’s representations during evidentiary hearings and in its briefs, there was no basis for parties to conclude that Edison’s forecast would be used without modification. Thus, the fact that SDG&E had not presented its own above-market costs does not constitute substantial evidence supporting permanent use of Edison’s forecast.

We therefore grant limited rehearing to permit parties to propose how above-market costs should be determined. Consistent with D-04-12-014, the above-market costs shall cover the period from 2004 to 2013. An ALJ Ruling shall be issued defining the scope of this limited rehearing.

Although we grant limited rehearing, we shall use D.04-12-014’s forecasted above-market costs for the allocation of DWR’s 2005 revenue requirement. Any of the adjustments to the 2004 and 2005 revenue requirement allocations resulting from adopting a final forecast of above market costs shall be made as part of the next available revenue requirement allocation cycle.

We remind parties that one of the purposes of adopting a permanent allocation methodology is to eliminate the annual litigation process associated with allocating DWR’s revenue requirement. (D.04-12-014, pp. 4-6.) Thus, we encourage parties to consider above-market cost proposals that will achieve that goal.

B. The Commission properly denied SDG&E's requests to present direct testimony and evidence

As noted in D.04-12-014, SDG&E had requested evidentiary hearings and the opportunity to present direct testimony and evidence opposing the proposed settlement entered into by the Settling Parties. (D.04-12-014, p. 5.) While SDG&E's request for evidentiary hearings was granted, the ALJ denied the utility's request to submit direct testimony and evidence. (D.04-12-014, p. 16.) SDG&E's repeated requests to the Commission for reconsideration of the ALJ's determination were also denied. (D.04-12-014, p. 17.) In its rehearing application, SDG&E contends that the Commission erred by not permitting it to present direct testimony and evidence regarding the use of a fixed forecast of above-market costs in the proposed settlement and explaining the specific impacts of the proposed settlement on its ratepayers. (SDG&E's Application, pp. 5 & 14.) This argument has no merit. SDG&E's argument is premised on its erroneous belief that it has an absolute right to present direct testimony and evidence under Rule 51.6 of the Commission's Rules of Practice and Procedure.

Rule 51.6 provides in relevant part that "contesting parties [to a proposed settlement] *may* present evidence and testimony on the contested issues." (Code of Regs, tit. 20, §51.6, subd. (a) (emphasis added).) Contrary to SDG&E's assertions, Rule 51.6(a), does not require the Commission to allow a contesting party to present evidence and testimony. Rather, the use of the word "may" rather than "shall" indicates that this action is permissive, not mandatory. Moreover, it is the presiding officer, not the contesting party, who determines whether to allow this evidence to be presented. (See Code of Regs, tit. 20, §63 (describing the authority of the presiding officer; see also Pub. Util. Code, §1701 et seq.)) SDG&E has not presented any authority that the Commission must allow it to present evidence and direct testimony, simply because it has requested to do so. To read the Commission's Rules of Practice and Procedure in this manner would mean that parties, not the Commission, would control the course of Commission proceedings. This would be contrary to the intent of Public Utilities Code section 1701. (See, e.g., *People v. Hull* (1991) 1 Cal.4th 266, 271 (stating that a

fundamental rule of statutory interpretation is that the intent of the Legislature should be ascertained so as to effectuate the purpose of the law).)

Additionally, Rule 561(b) provides: “The Commission may decline to set hearing in any case where the contested issue of fact is not material or where the contested issue is one of law.” In this instance, SDG&E has failed to identify any material contested issues of fact regarding the proposed settlement. A review of Table 1 in SDG&E’s Motion for Reconsideration indicates that many of the alleged disputed facts pertain to the rate impact of the proposed settlement on various customer classes. (See *Motion of San Diego Gas & Electric Company for Commission Decision Allowing SDG&E to Present Direct Testimony and Evidence on the Contested Issues Raised by the Proposed Settlement in Accordance with Rule 51.6* (“SDG&E Motion for Reconsideration”), dated July 1, 2004.) However, as explained by the ALJ, customer-specific rate impact information is a rate design issue and in the case of allocating DWR’s revenue requirement “[w]e’re looking at interutility issues, not intrautility rate design issues.” (55 RT, p. 7316:5-9.) Thus, the rate impact information SDG&E sought to introduce was found to be immaterial to determining the allocation methodology to be adopted.³ Additionally, SDG&E’s alleged disputed facts regarding PG&E’s proposed metric and the cost-follows-contract allocation methodology are not new issues, and were actively litigated during evidentiary hearings. In its rehearing application, SDG&E continues to fail to identify any material contested issues of fact regarding the proposed settlement agreement. Thus, we properly denied SDG&E’s request to present direct testimony and evidence.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.04-12-014 is granted, as discussed herein, to permit parties to propose how above-market costs should be determined. An ALJ Ruling shall be issued defining the scope of this limited rehearing.

³ Furthermore, as noted in the decision, a significant amount of rate impact information SDG&E sought to present through direct testimony and evidence is already in the record. (D.04-12-014, p. 17.)

2. Rehearing of all other issues is denied.

This order is effective today.

Dated January 13, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners